80-1828

No.

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROLLA L. SKIDMORE, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the requirements of Fed. R. Crim. P. 11(d) were met when the District Court accepted the petitioner's guilty plea.

2. Whether the ruling of McCarthy v. United States, 394 U.S. 459 (1969) applies to the provisions of Fed. R. Crim. P. 11(d) relating to "whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney."

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980

No.

ROLLA L. SKIDMORE, Petitioner

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The petitioner, Rolla L. Skidmore, prays that a writ of certiorari issue to review the judgment of the United States District Court for the Fourth Circuit, affirming his conviction in the United States District Court for the Northern District of West Virginia.

OPINIONS BELOW

The opinion of the court of appeals is unreported and appears in the Appendix, (App. 1), [1/] to this petition. The opinion of the district court is unreported and appears in the Appendix, (App. 12), to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on January 29, 1981. A timely petition for rehearing was denied on March 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

1/ The reference, "App." refers to the appendix accompanying this petition.

STATUTORY PROVISIONS INVOLVED

No statutes are involved. This petition is addressed to an interpretation of Rule 11(d) of the Federal Rules of Criminal Procedure which provides:

> "The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney."

STATEMENT OF THE CASE

On January 29, 1979, a five count information (JA. 3-7)[2/] was filed in the District Court for the Northern District of West Virginia charging the petitioner with willfully failing to file federal income tax returns for the years 1972 through 1976 in violation of Section 7203 of the Internal Revenue Code; 26 U.S.C. Section 7203.

Through discussions with Mr. William Wilmoth, an Assistant United States Attorney for the Northern District of West Virginia, the petitioner agreed to enter a plea of guilty to one count of the five count information, whereupon

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2/ The reference "JA" refers to the joint Appendix filed with the Court of Appeals.

the government would move the district court that the other four counts be dismissed. In arriving at this agreement, the petitioner was informed by Mr. Wilmoth, the only lawyer to whom he spoke, that the district judge assigned to his case had formerly been employed as a tax collector, and was primarily concerned with having the money owed the government paid. Further, the petitioner was informed by Mr. Wilmoth that to his recollection this district judge had never sentenced anyone to prison for such an offense. The U. S. Attorney also misrepresented to the petitioner that he was making as good a deal as if he were represented by counsel.

The conversation with Mr. Wilmoth mirrored prior discussions which the petitioner had had with agents of the

Internal Revenue Service, who had told the petitioner that the only concern of the government was to have the taxes paid, and not in seeing the petitioner imprisoned. Thus, the discussion with Mr. Wilmoth served only to reinforce the belief in the petitioner's mind that if he cooperated with the government, he would not be imprisoned.

On February 12, 1979 the petitioner appeared before the district court without legal representation and tendered a plea of guilty to Count V of the information (J.A. 9, 12-13, 56-57). The district court accepted the petitioner's guilty plea and found the petitioner guilty of Count V of the five-count information.

On March 22, 1979, the petitioner appeared before the district court, again without counsel, for sentencing.

After reviewing a presentencing report, the district court sentenced the petitioner to one year in prison and a fine of ten thousand dollars ($10,000.00).

Following this, the petitioner, now represented by counsel, moved the district court to permit him to withdraw his guilty plea. A hearing was held on this motion on February 1, 1980, and the testimony at the hearing revealed that the petitioner's decision to plead guilty did not result from threats, coercion or promises, but was the result of discussions which had taken place between the petitioner, Internal Revenue Service Agents and the Assistant United States Attorney (JA 13-14) 3/.

3/ This was established by the following testimony:

Q. (By the petitioner's attorney) Did you only have one meeting in Mr. Wilmoth's office?

A. (Petitioner) Right, just one meeting.

Q. At that meeting, did you try to negotiate with Mr. Wilmoth and ask him what he was going to do, or did he negotiate with you or tell you what he was going to do, or what?

A. Yes. And we had talked on the phone, too, and talked about the possibility of what would happen to this.
And he told me what the maximum sentence, what the maximum penalty was. And I don't know about the minimum.
And he also told me that Judge Haden was a former tax collector, and that he would be interested in getting his money back, and he had not known of him to give anybody a prison sentence for a case of this kind.

Q. Did these discussions have any influence on you with regard to your entering a plea of guilty?

A. They sure did.

Q. Now, Mr. Wilmoth never threatened you, did he?

A. No, no.

Q. He never promised you anything, did he?

A. Real nice and cordial.

Q. How did it come about that you ended up with a plea bargain to plea to one count? Whose idea was that?

A. That was Mr. Wilmoth's, I believe; I would'nt have known how to do it.

Q. Well, what did he say?

A. He suggested that he could write up these five counts, I believe it was, and I would plead guilty to one and the others would be dismissed when I pleaded guilty to that one.
(Emphasis added).

A careful review of the district court's questioning of the petitioner at the time the petitioner entered his plea, and at the hearing at which he was sentenced, reveals that the district court failed to question the petitioner as to whether discussions such as those referred to above took place. Had the district court so questioned the petitioner, the reason for his willingness to plead guilty would have been disclosed.

Such an inquiry would have also disclosed that the petitioner was relying on representations and misrepresentations made by the IRS and the U. S. Attorney that he would not go to jail. In reliance on this, the petitioner did not retain his own legal counsel. In fact, the United States Attorney misrepresented to the petitioner that he had made as

good a deal for himself as if he had had a lawyer.[4/] A lawyer could have made any number of better arrangements with the U. S. Attorney or the Justice Department.

The district court denied the petitioner's motion to withdraw his guilty plea by an order entered February 11, 1980 (App. 12, JA 22). In that order the court found "that Rule 11 of the Federal Rules of Criminal Procedure was complied with in all respects, and that the defendant's [petitioner's] plea of guilty was knowingly and voluntarily made with a full understanding of the

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4/ Cross-examination of Assistant U. S. Attorney Wilmoth at the February 1, 1980, hearing "His question was: 'If I hired a lawyer and came in here with him or her, could we get any better deal than pleading guilty to one count and dropping five, with no recommendation?' My answer was, 'No.'" (JA 109)

entire circumstances." (App. 15, JA 23). The district court further stated that the representations made to the petitioner concerning the district court's prior action in such cases did not rise to "manifest injustice in view of the record" which would have necessitated that the guilty plea be set aside (App. 14, JA 24).

On appeal the Fourth Circuit found that the district court "conducted the detailed inquiry and explanation required under Fed. R. Crim. P. 11" United States v. Skidmore, No. 80-5022, at 4 (4th Cir. 1980) (App. 6). In reaching this conclusion, the Fourth Circuit found that the three pronged inquiry, mandated by Aiken v. United States, 296 F.2d 604 (4th Cir. 1961) had been undertaken properly by the district court (App. 5). Thus, the Fourth Circuit felt that the district

court had fully inquired as to the reasons for the petitioner's willingness to plead guilty and allowed the petitioner's conviction to stand.

REASONS FOR GRANTING THE WRIT

AS TO QUESTION ONE

This Court has yet to decide the scope of the inquiry mandated by Rule 11(d) of the Federal Rules of Criminal Procedure as amended in 1975. This case affords the Court the opportunity to establish the parameters of that inquiry.

When accepting a guilty plea, Rule 11(d) requires the judge to ask the defendant if his decision to plead guilty stems from any prior discussions between the attorney for the government and the defendant. Such an inquiry was

not made in this case. In ruling that the full Rule 11 inquiry had taken place, both the district court and the circuit court completely ignored this crucial portion of the rule.

It is true that the district court inquired into whether any promises had been made to the petitioner before accepting his guilty plea. However, it is equally true that at no point in time did the district court ask the petitioner, "Have you had any discussions with the U. S. Attorney, one of his assistants, or any agent of the United States concerning your decision to plead guilty?" Or, more simply, "Has anyone talked with you about pleading guilty?" Such an inquiry, albeit brief, would have disclosed the basis behind the petitioner's desire to plead guilty.

The seed of a desire to plead guilty had been planted by the Internal

Revenue Service agents. This desire grew when the petitioner had discussions with the United States Attorney, who made statements and misrepresentations which amounted to a promise by inference that he would not be imprisoned. The flower blossomed when the trial judge informed the petitioner that the plea bargain was to the petitioner's advantage (JA 56). The fruit of this blossom was crushed, along with the petitioner's beliefs, when he was sentenced to prison by the judge.

The questions suggested are drawn from the 1975 amendment to Rule 11 of the Federal Rules of Criminal Procedure which states:

> "The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney."

This inquiry is mandatory, and it was not undertaken in this case. 5/

Although not addressing this provision of Rule 11, the Fourth Circuit ruled in a decision subsequent to the 1975 amendments that a defendant is entitled to plead anew if the trial court does not follow the required procedures when accepting a plea of guilty. United States v. Boone, 543 F.2d 1090 (4th Cir. 1976). This view has received wide acceptance. See United States v. Carter, 619 F.2d 293 (3rd Cir. 1980); United States v. Fels, 599F.2d 142 (7th Cir. 1979); United

5/ Further indicative of the mandatory nature of this inquiry is the legislative history of the 1975 Amendments to the Rule. See H.R. Rep. No. 94-247, 94th Cong., 1st Sess, Reprinted in [1975] U.S. Code Cong & Ad. News, 674, 676.

States v. Cammisano, 599 F.2d 851 (8th Cir. 1979); United States v. Gray, 584 F.2d 96 (5th Cir. 1978); United States v. Yazbeck, 524 F2d 641 (1st Cir. 1975).

Of the cases cited only Gray, supra and Fels, supra, involve the specific provision of Rule 11(d) which is involved in this petition. In both of those cases, wherein the defendants appeared with counsel, it was indicated that the portion of Rule 11(d) which is in issue in this petition was addressed only to an inquiry concerning the existence of, and terms of a plea bargain. The Rule 11(d) inquiry should not be limited solely to plea bargaining, as it is much too simplistic to assume that questioning with regard to the existence of a plea bargain will, in any situation, describe the reason for a defendant's willingness to plead guilty.

Thus, in cases such as this, where the petitioner appeared without counsel, the district court should be required to undertake an inquiry beyond the existence of a plea bargain. There is a high probability that a defendant, appearing pro se, is totally unfamiliar with the criminal justice system and may have been improperly induced into pleading guilty.

Indeed, such a broader inquiry is mandated by Rule 11(d) as the rule itself contemplates an inquiry into any type of discussions which may have been a factor in influencing the defendant to plead guilty. This Court has ruled as much, as in Fontaine v. United States, 411 U.S. 213 (1973), it pointed out that statements made by a defendant, appearing without counsel, during the Rule 11 inquiry are seen less conclusive than in

the cases if the defendant appears with an attorney.

This case presents an excellent opportunity to establish the extent of inquiry mandated under the new provisions of Rule 11(d), as the Court has yet to rule in a case in which these provisions were at issue. Furthermore, this case represents a perfect example of a situation in which a fuller inquiry under Rule 11(d) would have made a fundamental difference to the petitioner.

As to Question Two

The 1975 amendments to Rule 11 of the Federal Rules of Criminal Procedure have created a conflict among the circuits as to whether failure to comply with the amended rule is per se grounds to set aside a conviction based on a plea of

guilty.

In McCarthy v. United States, 394 U.S. 459 (1969), it was ruled that any noncompliance with Rule 11 constituted reversible error, entitling the defendant to plead anew; regardless of whether actual prejudice was shown to the defendant. The rationale behind the ruling was to insure that a defendant's rights were fully protected when tendering a plea of guilty; to insure that those entering pleas of guilty were fully aware of the consequences of their action, and to determine that the decision to plead guilty was not motivated by any improper conduct on the part of the government or its officers. Id.

As has previously been noted, Rule 11, along with the other Rules of Criminal Procedure, was amended in 1975. The amendments broadened the inquiry required

when accepting a guilty plea. No case has yet been decided by this Court stating whether those 1975 amendments are to be adhered to as meticulously as were the pre - McCarthy provisions of the rule.[6/]

With no guidance as to the consequence of violations of the post-McCarthy amendments, the circuits are split on whether or not the McCarthy holding applies. The following

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6/ It has been ruled that non-compliance with the mandates of Rule 11 may not be subject to attack under 28 USC § 2255. United States v. Timmreck, 441 U.S. 780 (1979). Timmreck, however, does not affect the McCarthy ruling with respect to direct appeals for violations of Rule 11.

cases have either explicitly, or by very strong implication, stated that the McCarthy ruling applies to the 1975 amendments to the Federal Rules of Criminal Procedure: United States v. Carter, 619 F.2d 293 (34d Cir. 1980); United States v. Fels, 599 F.2d 142 (7th Cir. 1979); United States v. Cammisano, 599 F.2d 851 (8th Cir. 1979); United States v. Roberts, 570 F.2d 999 (D.C. Cir. 1977), aff'd on other grounds, 600 F.2d 815 (1979), aff'd. 445 U.S. 552 (1980); United States v. Boone, 543 F.2d 1090 (4th Cir. 1976). On the other hand, several cases have adopted the view that non-compliance with the post - McCarthy amendments does not absolutely require that a conviction be set aside. United States v. Dayton, 604 F.2d 931 (5th Cir. 1979); United States v. Conrad, 598 F.2d 506 (9th Cir. 1979); Evers v. United States, 579 F.2d 71 (10th Cir.

1978), cert denied 440 U.S. 924 (1979).

The necessity for clarification on whether or not the McCarthy ruling is to be applied to the 1975 amendments to the rules is compelling given the increasingly greater numer of criminal cases which are finalized by guilty pleas. Resolving this issue would ensure uniformity which is manifestly necessary and acutely required.

Discussions with government agents led the petitioner to believe that he would not go to jail if he pleaded guilty. The trial court was required to inquire about such discussion. It did not. As a result ignorance, fear and misplaced trust formed the basis for his plea. The result in this case is the reason for the amended rule.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD E. ROWE
ROBERT Q. SAYRE, JR.

Attorneys for Petitioner,
Rolla L. Skidmore

May 1, 1981

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-5022

UNITED STATES OF AMERICA,

Appellee,

v.

ROLLA L. SKIDMORE,

Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Parkersburg. Charles H. Haden, II, District Judge.

Decided: January 29, 1981.

PER CURIAM:

Rolla L. Skidmore entered a plea of guilty to one count of a five-count indictment for willful failure to file an income tax return in violation of 26 U.S.C. § 7203; he was sentenced to one year of incarceration and was fined ten thousand dollars. Skidmore did not seek the assistance of counsel from the time he was aware that an investigation was proceeding against him until after he was sentenced. Subsequent to sentencing, Skidmore retained counsel and filed a motion to withdraw his guilty plea pursuant to Fed. R. Crim. P. 32(d). The district court denied that motion, and this appeal followed. Upon careful review of the record and other materials before this Court, we affirm the district court's judgment of conviction.

On appeal, Skidmore contends: (1) that the trial court erred in finding a voluntary and intelligent waiver of his constitutional right to counsel; (2) that the trial court failed to comply strictly with the requirements of Fed. R. Crim. P. 11; (3) that the trial court failed to assume the requisite protective role towards a pro se defendant in its acceptance of his guilty plea; and (4) that the trial court's denial of his Rule 32(d) motion will result in manifest injustice.

In Aiken v. United States, 296 F.2d 604 (4th Cir. 1961), this Court acknowledged the weighty responsibility of the district courts in determining whether an accused who seeks to waive his right to counsel does so intelligently and knowingly. We stated that the district judge should, "(1) explain the charges

and the possible punishment, (2) inquire whether any threats or pressures have been brought to bear on him, and (3) determine whether any promises have been made to him by the investigating or prosecuting officials." Id. at 607. In addition to this minimum inquiry, we have suggested that the district judge develop on the record information pertaining to the defendant's ability to make a waiver decision and that the judge explain the value of counsel to the accused. Townes v. United States, 371 F.2d 930 (4th Cir. 1966), cert. denied, 387 U.S. 947 (1967). Finally, we have stated that the defendant should be allowed sufficient time in which to make the waiver decision. Id. at 934.

We commend the district judge in this case for the conscientious discharge of his responsibility in the acceptance

of Skidmore's waiver. During the defendant's pre-arraignment court appearance, the judge learned of Skidmore's intention to plead guilty pursuant to a plea agreement with the government and of his desire to proceed without benefit of counsel. At this time, the judge conducted the entire colloquy set forth in Aiken, supra, and Townes, supra, and he afforded the defendant one week's time in which to make the waiver decision. The judge's subsequent determination that Skidmore voluntarily and intelligently waived his right to the assistance of counsel finds ample support in the record. 1/

1/ We note, in passing, that the district judge not only explained the value of legal counsel to the plaintiff but also urged him to obtain such assistance.

Before accepting Skidmore's plea of guilty at arraignment, the district court conducted the detailed inquiry and explanation required under Fed. R. Crim. P. 11. On direct appeal, a guilty plea will be set aside as invalid if the district court has failed to exercise strict compliance with Rule 11 in all respects. McCarthy v. United States, 394 U.S. 459 (1969). Cf. United States v. Timmreck, 441 U.S. 780 (1979). Skidmore asserts technical non-compliance with the rule in two respects: he claims that he was not informed of the mandatory minimum penalty provided in 26 U.S.C. § 7203 and that he was not informed of the maximum possible penalty because the judge did not mention that he could be assessed the costs of prosecution under the statute.

Skidmore's first contention has no merit as the statute does not provide a mandatory minimum penalty; rather, the district judge may impose any penalty less than the statutory maximum which he deems appropriate under the circumstances. See, e.g., United States v. Baer, 575 F.2d 1295, 1299 (10th Cir. 1978). With respect to Skidmore's second contention, we note that when the defendant pleads guilty, the costs involved are nominal. Skidmore, in fact, was not held liable for the costs of his prosecution. The omission of advice about liability for costs of prosecution in all events is not a direct consequence of the plea because direct consequences have been defined as results having "a definite, immediate and largely automatic effect on the range of the defendant's punishment." Cuthrell v. Director, Patuxent

Institution, 475 F.2d 1364, 1366 (4th Cir. 1973). The sole purpose of advising a defendant as to minimum and maximum penalties is to apprise him of the direct consequences of his plea. See Advisory Committee Notes, Fed. R. Crim. P. 11. [2]

Upon completion of the Rule 11 inquiry, the district court accepted Skidmore's guilty plea finding that the plea was entered voluntarily and intelligently. The appellant argues that the plea was induced by his inexperience with the judicial system in conjunction

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2 See Bacher v. United States, 517 F.2d 589, 595 (7th Cir. 1975) for the suggestion that omission of advice regarding a defendant's liability for the costs of prosecution in a Rule 11 hearing may be corrected on direct appeal simply by remitting any costs actually assessed and collected.

with his reliance upon a statement made by the Assistant United States Attorney prior to arraignment. The government's attorney had informed Skidmore that he could not recall the trial judge assigned to his case ever sentencing anyone to prison for this type of tax offense. Apparently, Skidmore did not attach undue significance to this statement because he testified during the Rule 11 hearing that no one had made any predictions to him regarding the outcome of his case. It is true that if an accused has waived his right to counsel at the taking of the plea, his Rule 11 statements may be less conclusive than they would be had he been represented. Fontaine v. United States, 411 U.S. 213 (1973). Nevertheless, Skidmore does not allege a false promise on the part of the government's attorney, but simply, one man's

recollection upon which he relied to his detriment. Disappointed hope or expectation of leniency--so long as it is not wrongfully induced by the government--will not justify setting aside a district court's finding of a voluntary and intelligent guilty plea. Vanater v. Boles, 377 F.2d 898, 900 (4th Cir. 1967).

Withdrawal of a plea of guilty after sentencing is allowed only to correct manifest injustice. Fed. R. Crim. P. 32(d). In considering Skidmore's Rule 32(d) motion, the district court applied the analysis set forth by this Court in United States v. Carden, 599 F.2d 1320, 1322 (4th Cir.), cert. denied, 444 U.S. 874 (1979). The District court discerned no manifest injustice in Skidmore's case, and we concur in this determination

based on the reasoning of the district court.

We perceive no merit in any of Skidmore's contentions. Because the dispositive issues recently have been decided authoritatively, we dispense with oral argument and affirm.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA

UNITED STATES OF AMERICA,

Plaintiff,

v. Criminal No. 79-0001-E

ROLLA L. SKIDMORE,

Defendant.

Entered: February 11, 1980

O R D E R

On February 1, 1980, came the United States of America by William A. Kolibash, Assistant United States Attorney for the Northern District of West Virginia, and also came the defendant, ROLLA SKIDMORE, in person and by his attorneys, Joseph R. Goodwin and Richard E. Rowe, for hearing upon defendant's motion to set aside his plea of guilty pursuant to Rule 32 (d) of the Federal Rules of Criminal Procedure.

Rule 32(d) states as follows:

"Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the Court

> after sentence may set aside the judgment of conviction and permit the Defendant to withdraw his plea."

Sentence was passed upon the defendant in this case on March 22, 1979, and the judgment and commitment order was entered March 28, 1979.

After reviewing the record in this case, the motion of the defendant, and evaluating the testimony of defendant Skidmore and Assistant United States Attorney William D. Wilmoth given at the hearing and the arguments of counsel, the Court is of the opinion that there are no reasons demonstrated which would lead this Court to find that manifest injustice would result if the defendant's conviction is not set aside and his plea of guilty withdrawn. But cf. United

States v. Lias, 173 F.2d 685 (4th Cir. 1949).

The factors to be considered by the Court in making its determination are (1) the Court's Rule 11 inquiry; (2) the quality of representation received by Skidmore; (3) his mental condition at the time the guilty plea was entered; and (4) whether he had asserted his innocence. United States v. Carden, 599 F.2d 1320, 1322 (4th Cir. 1979); United States v. Strauss, 563 F.2d 127, 131 (4th Cir. 1977).

Applying these factors to this case, the Court finds that Rule 11 of the Federal Rules of Criminal Procedure was complied with in all respects, and that the defendant's plea of guilty was knowingly and voluntarily made with a full understanding of the entire circumstances. All of this will be more

adequately reflected in the record of defendant's guilty plea.

The defendant specifically claims that the Assistant United States Attorney advised him that the sentencing judge "who would be handling the case had never sentenced anyone to prison for failure to file," and the defendant "believed that he would not be sentenced to prison for a guilty plea to these charges, and that he would be given a fine for the guilty plea" is insufficient to demonstrate manifest injustice in view of the record in this matter. The defendant was addressed specifically on more than one occasion to the fact that he was subject to certain maximum penalties, and that the imposition of sentence would be solely the determination of the Court. The defendant acknowledged this and under oath stated that

no one had indicated to him that he would receive any specific sentence. See generally, Blackledge v. Allison, 431 U.S. 63 (1977). Thus, as long as no one made a specific promise to the defendant concerning his sentence, his belief regarding final sentence is irrelevant. See, e.g., U.S. v. Rich, 516 F.2d 861 (2nd Cir. 1975); U.S. v. Futeral, 539 F.2d 329 (4th Cir. 1975) and U.S. v. Battle, 467 F.2d 569 (5th Cir. 1972).

Although the defendant appeared without counsel throughout these proceedings, such decision was his own, and was entered into knowingly and voluntarily after repeated monitions by the Court that the defendant retain counsel. See Faretta v. California, 422 U.S. 806 (1975). Moreover, the plea bargain which defendant entered into was in accordance with the policy set by the

Tax Division of the Department of Justice, as the testimony of Mr. Wilmoth showed, and would have been the same even if defendant was represented by counsel. Therefore, the Court finds no manifest injustice resulting from defendant's appearance without counsel.

Based upon the Court's questioning of defendant Skidmore and his observations of Skidmore at the time of his plea, the Court finds no defects in the mental condition of the defendant at the time of his guilty plea.

Finally, the Court finds that defendant Skidmore up to and including this hearing has never asserted his innocence, but, to the contrary, has asserted his guilty and willingness to have this case resolved by a plea of guilty.

For all the reasons set forth above, it is the ORDER of this Court that the Defendant's Motion Pursuant to Rule 32(d) to Set Aside Judgment of Conviction and Permit Defendant to Withdraw His Guilty Plea is DENIED.

The Clerk is directed to send certified copies of this Order to all counsel of record and to the United States Marshal's Office at Fairmont, West Virginia.

ENTER: FEB 11 1980

/s/ CHARLES H. HADEN II
United States District Judge

Office-Supreme Court, U.S.
FILED
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CLERK

No. 80-1828

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROLLA L. SKIDMORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

LAWRENCE G. WALLACE
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Washington, D.C. 20530
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In the Supreme Court of the United States

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No. 80-1828

ROLLA L. SKIDMORE, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks relief from a conviction based on a guilty plea on the ground that the judge who accepted the plea did not ask petitioner if it resulted from discussions with government attorneys.

1. When petitioner learned he was under investigation by the Internal Revenue Service for failing to file income tax returns for 22 years, he initiated contact with the Office of the United States Attorney for the Northern District of West Virginia (A. 93).[1] After petitioner's case was officially assigned to that office, Assistant United States Attorney Wilmoth con-

[1] "A." refers to the appendix filed in the court of appeals.

tacted petitioner and then met with him on January 10, 1979 (A. 38, 93-94). Wilmoth proposed dropping four of the anticipated five counts of willful failure to file if petitioner would plead guilty to one count (A. 79, 102). Part of the proposal was that the government would make no recommendation as to sentence (A. 102).

On January 19, 1979, a five-count information was filed against petitioner (A. 3-6). Each count charged a willful and knowing failure to file an income tax return in violation of 26 U.S.C. 7203. Petitioner appeared before the district court that day and said that he wished to plead guilty and to proceed without the assistance of counsel (A. 29, 31). The court ascertained through detailed questioning that petitioner was 59 years old, a high school graduate, and a career State Farm insurance agent (A. 26-27, 52). The court also determined that petitioner was in good physical and mental health and was not using any alcohol or medication that might impair his ability to understand the proceedings (A. 27).

The court told petitioner of the charges (A. 28-29) and emphasized the possible penalty (A. 28):

> THE COURT: I would bring to your attention, because it nowhere appears on the information, are you also aware that each one of those charges carries with it a possible maximum penalty of either one year imprisonment or a ten thousand dollar fine or both?
>
> [PETITIONER]: Yes, I am. I think I was aware of that.
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> THE COURT: In other words, do you understand, if the Court felt it was appropriate, that you could be sentenced to periods of time in a prison of up to five years and could be fined up to fifty thousand dollars, or anything less in re-

gard to either one, whatever I consider to be appropriate under the circumstances.

[PETITIONER]: I understand, your Honor.

When petitioner again said he intended to proceed without counsel, the court suggested to him the advantages of retaining an attorney (A. 29-31, 32-33). The court also told petitioner of his right to plead not guilty and stand trial and recited the consequences of a plea of guilty and the rights petitioner would waive by pleading guilty (A. 31-33). This exchange then occurred (A. 33-34):

THE COURT: Has anyone made any predictions to you as to how these charges will be handled before this Court?

[PETITIONER]: No sir. Other than what you said there awhile ago, that I plead guilty to one. That's the only thing that's been—I've been assured that they could not tell me what you were going to do.

THE COURT: Because they cannot.

[PETITIONER]: That's the way I like it.

THE COURT: I would have and I will have in this case a pre-sentence investigation report made. And I will take that into consideration before I make disposition in the case. That will be one of the several things that I will consider. You will certainly be given a copy of that and given the opportunity to question the matters contained in that pre-sentence investigation report. But I want to make it clear to you that by no means could anyone at this time predict what I might do.

[PETITIONER]: No, sir, I'm sure of that. They have definitely warned me of that.

The court then set the date for accepting any plea from petitioner several weeks off, to give petitioner

a further opportunity to reflect on his plea and on his decision not to obtain an attorney (A. 34-35). The judge asked petitioner if he could afford an attorney; petitioner insisted that he could (A. 35-36). The judge then asked if petitioner had "any questions in regard to what a lawyer could or could not do for you that I might be able to answer" (A. 36). Petitioner said: "I have no questions. I have a statement. I don't see where a lawyer can help me anyway in the world. I made the mistake some time ago. * * * I let it go until they actually caught up with me. I don't see—I've done it. I have no—" (A. 36). The judge then said that he "strongly recommend[ed]" that defendants in his court be represented by counsel; he reiterated the advantages of obtaining an attorney (A. 37).

On February 12, 1979, petitioner appeared in the district court to enter his plea. The court noted that it had received a written statement from petitioner of his continued wish to make the plea and to proceed without counsel, and petitioner said that this was still his intention (A. 40). The court then inquired into the plea agreement (A. 41-42):

> THE COURT: As you are aware, sir, the United States Attorney has filed an information against you charging several counts in relation to violation of the income tax statutes. And you have agreed previously, apparently, to plead to one of those counts. Is that correct?
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> [PETITIONER]. That is correct, sir.
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> THE COURT: Now, Mr. Wilmoth, would you explain the circumstances of the oral plea agreement.
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> MR. WILMOTH: Well, your Honor, [petitioner and his wife] came to my office on Janu-

> ary 10, and then [petitioner] and I talked on the telephone on January 15th.
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> We agreed that in return for [petitioner's] plea of guilty to count five of the information that the Government would at the time of sentencing move to dismiss the remaining counts and would make no recommendation to the Court as to sentence.
>
> THE COURT: Is that the entire plea agreement as you understand it?
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> [PETITIONER]: Yes, sir, that is, as I understand it; yes, sir.
>
> THE COURT: Are you satisfied with that plea agreement so far as you are concerned?
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> [PETITIONER]: Yes, I am satisfied with the plea agreement. However, I would like to make a statement, if I may.

Petitioner then made another statement admitting his guilt, which the court did not accept as a guilty plea (A. 42-43). The court warned petitioner that he was under oath and could be prosecuted for perjury if he made any false statements (A. 44). The court then explained the charge against petitioner in detail (A. 45-46). The court specifically determined that petitioner understood that he could not have committed the crime charged if he had acted "by accident or mistake * * * it took a specific intent on your part to fail to file these income tax returns, in violation of law, knowing that you had a legal duty to file such returns" (A. 46). The court then enumerated, again, the rights petitioner waived by pleading guilty (A. 46-49). The court told petitioner that he was exposing himself to a penalty of "up to one year in prison or a ten thousand dollar fine or both" (A. 49); petitioner replied, "I understand that, sir. That was explained to me the last time." Petitioner said he

understood that the government had "made no arrangement or bargain with you in regard to the penalty" and that the sentence remained "solely in [the court's] discretion" (A. 49).

In response to questioning by the court, petitioner stated that no one had induced him to plead guilty against his will, that no one had pressured, intimidated or threatened him, that the plea was an act of his own free will, and that no one had made any predictions about how the court would dispose of his case (A. 49-50). The court heard testimony from an Internal Revenue Service Agent confirming petitioner's guilt (A. 50-53) and again "strongly advise[d]" petitioner to obtain counsel (A. 55-56). When petitioner again declined, the court ascertained that petitioner was "satisfied with the bargain that you made with the Government to plead guilty to one count" (A. 56) and, when petitioner repeated his desire to plead guilty, accepted the plea (A. 10-11, 56).

On March 22, 1979, petitioner was sentenced to one year's imprisonment and a fine of $10,000 (A. 12, 64-65). On April 26, 1979, petitioner, by then represented by counsel, moved to withdraw his guilty plea, alleging a number of defects in the plea-taking proceeding (A. 15-20). The district court, after holding a hearing, denied the motion in a written opinion (Pet. App. 12-19). Petitioner appealed from the denial, and the Fourth Circuit affirmed (*id.* at 1-11). It rejected petitioner's claims that the judge had not complied with Fed. R. Crim. P. 11 (*id.* at 5-7) and that petitioner should be allowed to withdraw his guilty plea because he relied on a government attorney's statement that in the attorney's experience the district judge had never imposed a prison term for an offense comparable to petitioner's (*id.* at 9-10). The court of appeals also "commend[ed] the

district judge * * * for the conscientious discharge of his responsibility in the acceptance of [petitioner's] waiver" (Pet. App. 4-5).

2. Petitioner's sole contention in this Court is that the district court violated Rule 11(d) by not asking whether petitioner's guilty plea was the product of "discussions" with government attorneys. This contention is wholly without merit.[2] On several occasions, the district judge asked petitioner about the plea agreement, ascertaining that petitioner understood it and considered it satisfactory. The district court also asked the Assistant United States Attorney to "explain the circumstances of the agreement" (A. 41-42) and learned of that attorney's conversations with petitioner. Petitioner stated that the government attorney had described the entire plea agreement and that petitioner was satisfied with it. The district judge also repeatedly asked petitioner if government attorneys had promised that petitioner would receive a certain sentence. At one point, in response to the judge's question, petitioner stated that government attorneys had not even predicted what sentence he might receive (A. 50). The district court asked petitioner if he was pleading guilty against his will or because of force, threats, or intimidation. It is difficult to imagine a more thorough inquiry into the discussions that led to the guilty plea.[3] In this re-

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[2] Because the district judge complied with Rule 11, this case does not present the question, adverted to in the petition (Pet. 19-22), of the extent to which strict compliance with the provisions of Rule 11 is required. See, *e.g.*, *United States* v. *Dayton*, 604 F.2d 931 (5th Cir. 1979) (en banc); Brief for the United States at 33-34 n.19, in *United States* v. *Timmreck*, 441 U.S. 780 (1979).

[3] Petitioner suggests that the judge's questioning failed to uncover two aspects of his discussions with government at-

spect, as in all others, the district judge complied fully with Rule 11.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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torneys—their "representations and misrepresentations * * * that [petitioner] would not go to jail" (Pet. 9) and their "misrepresent[ation] * * * that [petitioner]was making as good a deal as if he were represented by counsel" (Pet. 5). But the record demonstrates that the district judge repeatedly and specifically asked petitioner about any assurances the government had given him about his sentence; and the judge went to great lengths to ascertain that petitioner knew the advantages of retaining an attorney and that his decision to proceed without counsel was his own choice. In addition, the district judge found, in his order denying petitioner's motion to withdraw his guilty plea, that "the plea bargain which [petitioner] entered into was in accordance with the policy set by the Tax Division of the Department of Justice * * * and would have been the same even if defendant was represented by counsel" (Pet. App. 17-18). Thus government attorneys cannot be accused of having misled petitioner, and petitioner has failed to show that the alleged defect in the plea-taking proceeding prejudiced him.

Petitioner appears not to have appealed directly from the judgment entered on his guilty plea. Under *United States* v. *Timmreck, supra*, petitioner's failure to show prejudice would be fatal to any collateral attack on a conviction based on a guilty plea, even if Rule 11 had been violated. But the time for a defendant to file an appeal in a criminal case can be extended to 40 days (see Fed. R. App. P. 4(b)), and petitioner moved to withdraw his guilty plea within that period; thus petitioner's challenge to his conviction arguably may be treated as a direct appeal. This issue is immaterial to this case, in any event, because the district judge complied with Rule 11.

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